FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. [redacted] 129

SAMUEL H RABIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

/s/ WALTER M. NELSON
GEORGE STONE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1486

SAMUEL H. RABIN,

vs. *Petitioner,*

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Samuel H. Rabin, prays for the issuance of a writ of certiorari to review the decisions of the Supreme Court of the State of Michigan, in affirming, on April 17, 1947, the judgment of the Recorder's Court for the City of Detroit, in the State of Michigan, and in denying, on May 15, 1947, petitioner's application for re-hearing, in connection with certain criminal proceedings.

I

Statement of the Case [1]

Petitioner was tried in the Recorder's Court for the crime commonly called "arson." The information filed against

[1] Because of petitioner's desire to file this petition before this Court adjourns, and the fact that at the time of writing of same the printed record is not available, references thereto cannot be made. Some references, however, will be made to the printed record in the State Supreme Court and the opinion of that Court printed in 27 N. W. 2d 126.

him under sections 71 et seq., P. A. 1931, of the State of Michigan (Mich. Stat. Ann., sections 28.266 et seq.) contained 5 counts:

1. For burning a certain occupied dwelling house;

2. For burning a certain building within the curtilage of an occupied dwelling house, to-wit, a store building;

3. For burning a store building, said building not being a dwelling house or a building within the curtilage of a dwelling house;

4. For burning personal property with intent to injure and defraud insurers;

5. For burning a certain building with intent to injure and defraud insurers.

At the trial the people claimed, through its witnesses Slew, Rubenstein, and Lebove, that petitioner hired and procured them to set the fire. Admittedly there is no proof whatsoever that petitioner had any participation in the physical preparation or setting of the fire. Indeed the undisputed proofs showed that he and his entire family were absent from the city during the entire day (see 27 N. W. 2d, at p. 128). Petitioner claims that in such circumstances he should have been charged with "procuring" and not "burning"; that proof of "procurement" (the only proof against him) could not sustain a charge of "burning"; that he was therefore convicted without due process of law of a crime not charged against him. This point was urged upon the State Supreme Court, but without success.

During the course of the argument of counsel to the jury, two jurors failed to appear because of illness. It was then agreed by the prosecutor, counsel for petitioner, and petitioner, that the case proceed with the ten remaining jurors. This consent was oral and not in writing (see 27 N. W. 2d, at p. 130).

It also appeared that at the same time another juror, Mrs. Hanson, although present advised the court that she was ill. Upon her statement, in answer to the judge's query whether she could "go ahead today," that she was "able to go ahead" but not after today, the prosecutor and counsel for petitioner agreed to proceed[2] (see 27 N. W. 2d, at pp. 130-1).

Toward the close of the arguments, two jurors reported to the court that they were not feeling well. One inquired whether she could be excused after this case. The judge told them to see him after the case was over and told at least one of them that he "would probably excuse her" at the termination of this case.[3] After this colloquy, the record shows that the arguments were concluded, the lengthy charge given to the jury, the jury retired, deliberated, and reached a verdict all in one day.[4]

Petitioner urged in his assignments of error to the State Supreme Court that the waiver was a nullity, that the jury of ten was illegal, and its verdict void, that undue pressure or coercion was used upon the jurors in their deliberations, that consequently he was denied his constitutional right to

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[2] See pp. 331-2 of the printed record in the State Supreme Court:

"The Court: Are you able to go ahead today Mrs. Hanson?

"Mrs. Hanson: *Not after today.*

"The Court: *Well not after today.* Do you think you could go ahead today?

"Mrs. Hanson: I'll try."

[3] See p. 364, idem:

"The Court: I think I should advise counsel. I always believe in doing that. The Court communicated with two jurors. I will tell you what was said. The juror, number eight, who wasn't feeling well, wants to know if she could be excused *after the termination of this case, and I advised her I would talk to her at any time and indicated that I would probably excuse her.* The other juror, I think it was number five, she wasn't feeling well, either, and I said *'You ladies see me after the case is over.'*" (Italics supplied.)

[4] See p. (x) of the printed record in the State Supreme Court.

trial by jury as commanded by the Federal and State Constitutions, as well as due process of law under the Fourteenth Amendment to the Federal Constitution. The court considered these questions and held that the waiver was legal, and the verdict valid.

Application for re-hearing repeating petitioner's claim of denial of his constitutional rights was duly submitted and denied by the State Supreme Court.

On petitioner's application, that court on May 21, 1947, stayed proceedings for a period of 30 days to enable petitioner to apply to this Court for a writ of certiorari and for further stay. A petition for such further stay was presented to this Court (Reed and Jackson, J.J.) on June 10, 1947, but was denied without prejudice and with leave to renew upon the filing of this petition for certiorari.

II

Questions Presented

A. Was petitioner deprived of due process of law under section 1 of the 14th Amendment to the Constitution of the United States, because the information failed to charge the crime proved (allegedly) against him?

B. Does a trial under the laws of the State of Michigan by jury of ten members upon oral consent of a defendant, constitute due process of law under such 14th Amendment?

C. Was there such influencing or coercion of the jury as to void its verdict under such 14th Amendment?

III

Reasons for Allowance of the Writ

A. The Supreme Court of the State of Michigan has considered and denied petitioner's claim that under the 14th Amendment, he must be charged with the crime proved against him.

B. The Supreme Court of the State of Michigan has considered and denied petitioner's claim that under Article II, section 19, of the Constitution of 1900 of the State of Michigan, only a jury of twelve members can convict him in accordance with due process of law under the 14th Amendment.

C. The Supreme Court of the State of Michigan has considered and denied petitioner's claim that the jury was so influenced and coerced as to make its verdict a nullity and a denial of due process of law.

IV

Prayer

WHEREFORE, petitioner, Samuel H. Rabin, prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of Michigan commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in this cause numbered on its docket No. 43-273, and entitled "People of the State of Michigan, Plaintiff and Appellee, v. Samuel H. Rabin, Defendant and Appellant," to the end that this cause may be reviewed and determined by this Court and that the judgment of the said Supreme Court of Michigan be reversed and for such further relief as this Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Supreme Court of Michigan has not been as yet officially reported, but has been reported in volume 27 N. W. 2d, p. 126.

II

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 344).

III

Statement of Case

A summary statement of the case has already been made in the Petition for a Writ of Certiorari under heading I, which is hereby adopted and made a part of this brief.

IV

Specifications of Error and Summary of Argument

A. The Supreme Court of the State of Michigan erred in not holding that the information did not include the crime proved, and that petitioner was not denied due process of law.

B. The Supreme Court of the State of Michigan erred in holding that a jury of ten members, with oral consent of a defendant, is a legally constituted jury under the laws and

Constitution of the State of Michigan, and that its verdict, followed by sentence, is not a denial of due process of law.

C. The Supreme Court of the State of Michigan erred in not holding that the jury was so influenced and coerced as to make its verdict a violation of due process of law.

Argument

A

Petitioner was charged with "burning" rather than "procuring" the burning under section 71, Act 328, P. A. 1931 (Mich. Stat. Ann., section 28.266) which defines "burn" to mean setting fire to, etc., as well as procuring another to do such act. Petitioner contended that since the only proof was that he might have "procured", the law of the State of Michigan commanded that he be charged specifically with the "procuring", and that failure to do so was denial of due process of law.

Meister v. *People,* 31 Mich. 99, held precisely that the arson statute made a distinction between the burner and the procurer and necessitated specific indictment accordingly. Proof of one could not be made under charge of the other even though statute at that time made every accessory liable as principal (see 99 Mich. at 111). The State Supreme Court, without overruling the *Meister* case, overruled petitioner's contention stating that the statute as now amended authorized such action (see 27 N. W. 2d, at p. 129).

The State Court's affirmance of the procedure under such statute (which simply put into one section what the earlier statutes had in several sections) has effectually permitted petitioner to be convicted of a crime not charged against him.

Conviction of a crime not charged is void and a denial of due process of law under the 14th Amendment to the Constitution of the United States.

DeJong v. *Oregon*, 299 U. S. 353.

The construction of the present statute by the State Supreme Court has deprived petitioner of his rights under the 14th Amendment. Under such circumstances, this Court should review.

Cf. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481.

B

Article II, section 19, of the Constitution of 1908 of the State of Michigan, guarantees every accused the right to trial by jury, which may consist of less than 12 members in courts not of record.[5] Article V, section 27, provides on the other hand that the legislature may authorize trial by jury of less than 12 members.

Section 17131, Comp. L. 1929 (Mich. Stat. Ann., section 28,856), now provides for waiver of a jury and election to be tried by the judge by a writing signed by defendant and filed in the cause.

The State Supreme Court has agreed with petitioner that no legislative action has been taken under Article V, section 27, to reduce the size of the jury, and that the statute mentioned applies only to complete waiver of the jury and not to waiver of one or two members (see 27 N. W. 2d, at p. 130). But by sustaining the validity of the 10-member jury, the State Supreme Court has, in destroying petitioner's right to a duly constituted, legal jury, ignored or evaded the established law, that the Constitution, by necessary implication, requires a jury of not less than 12 members; that there can be no waiver of a jury because at

[5] The Recorder's Court of the City of Detroit is a court of record.

common law a trial by jury prevailed exclusively in criminal cases,

People v. *Henderson*, 246 Mich. 481;

that prior to the enactment of the statute mentioned above, even though a defendant may waive a jury by pleading guilty, this is an exception and the right "cannot be waived, and that a trial by the judge, even by consent of the prisoner, is erroneous;"

People v. *Warren*, 122 Mich. 504;

that the constitutional provision guaranteeing right to jury trial means a "trial by a jury of 12 good men and true" and that a legislative act authorizing a trial judge to excuse a juror because of illness is unconstitutional,

McRae v. *Railroad Co.*, 93 Mich. 399.

While the right to trial by jury as such is not protected by the due process clause, nevertheless, the State of Michigan having established the jury as part of the judicial machinery in the administration of criminal justice, that jury must be one which is duly constituted under applicable laws.

Cf. *Brown* v. *New Jersey*, 175 U. S. 172.

The right to a jury trial embraces the right to a proper jury.

Glasser v. *United States*, 315 U. S. 60.

Right to trial by jury is a fundamental right, which, having been granted by the State, is protected by the 14th Amendment. Thus discrimination in the selection of a jury is struck down by such amendment.

Norris v. *Alabama*, 294 U. S. 587.

State courts are bound to proceed in such manner that all substantive rights of the parties under controlling Federal laws are protected. Whether the State Supreme Court did, raises a Federal question reviewable by this Court.

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239.

Thus the denial by the State Court of the fundamental right to counsel is the denial of a fair trial and the denial of due process of law.

DeMeerleer v. *Michigan*, 329 U. S. 663.

In *People* v. *Mitchell*, 266 N. Y. 15, 18, the court said:

> "Trial by jury in all cases in which it has been heretofore used shall remain inviolate forever (N. Y. Const. art. I, sec. 2). *If defendant was tried otherwise than by a common law jury of twelve men he has been convicted without due process of law.*" (Italics supplied.)

C

The illness of the two jurors, reported to the trial judge, his direction to them to proceed for the day and the promise to excuse them at the close of the case cannot be casually brushed aside as it was by the State Supreme Court. To say that these jurors were not thereby induced and coerced into a quick decision by the hope of excusal at the end of the case by the trial judge's action, is to ignore predictable human behavior. That these jurors were willing to reach any decision, not because of the evidence before them, but because of their desire to go home, seems more than a fair inference from this record.

In view of the illness of the two jurors and their desire to be excused, the fact that the arguments to the jury were completed, the lengthy charge given, the jury retired and

reached a verdict all in one day after a week-long trial is indicative evidence of coercion in reaching a decision.

Cf. *Peterson* v. *United States* (C. C. A. 9, 1914) 213 F. 920.

An agreement to a verdict induced by a desire of a juror to be relieved because of his illness is the result of coercion, and is, in law, no verdict.

United States v. *Pleva* (C. C. A. 2, 1933) 66 F. (2d), 529.

Judicial pressure whether acting on the hopes or fears of the jurors is improper. A verdict hastened by the action of the judge, however worthy the motive, cannot be the result of that deliberation which the law requires.

People v. *Golub*, 333 Ill. 554;
People v. *DeMaux*, 194 Mich. 18.

Coercion of a jury is tantamount to the direction of a verdict and deprives a defendant of "that fair and impartial trial the law accords to them, no matter how convincing their guilt may appear."

Wissel v. *United States* (D. C. A. 2, 1927) 22 F. (2d) 468, 471.

Coercion of a jury into reaching a verdict is a denial of due process of law under the decisions of this Court.

Moore v. *Dempsey*, 261 U. S. 86;
Frank v. *Mangum*, 237 U. S. 309.

Conclusion

The State Supreme Court, in affirming as it did petitioner's conviction, has denied him the due process of law guaranteed by the 14th Amendment.

We therefore pray that a writ of certiorari issue from this Court to the Supreme Court of the State of Michigan to review its affirmance of said conviction of petitioner by the Recorder's Court for the City of Detroit, in the said State of Michigan, and said Court's denial of his application for rehearing, and that the judgment of said Court be reversed on hearing and the cause remanded for further proceedings within the limitations of established constitutional restraints.

Respectfully submitted,

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(1183)

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 1486 129

Samuel H. Rabin, Petitioner, v. The People of the State of Michigan.	On application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 1486

Samuel H. Rabin, Petitioner, v. The People of the State of Michigan.	On application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

I

Opinion of the Court Below.

The opinion of the court below has not been officially reported. It is correctly set forth in the record (417-425), and it is unofficially reported as People v. Rabin, 27 NW 2d 126.[*]

II

Counter-Statement of the Case.

The following is deemed necessary in correcting inaccuracies and omissions in the statement of petitioner:

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[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed record.

1. We would add that following a preliminary examination,[1] a magistrate bound the petitioner to appear before the court below and held him and other defendants for trial (viii).

While counsel are correct in stating that the information (1-4) filed by the prosecuting attorney originally contained five counts, charging the crime commonly known as 'arson', they might have clarified the issue by noting that the prosecuting attorney elected (309, 369) to abandon the second count and to amend (381) the third;[2] and that the case went to the jury on the following counts, each of which adhered to the express language of the statute defining the offense:[3]

> **Count One** (2) charged in substance that the defendants did 'wilfully and maliciously burn a certain occupied dwelling house, to wit, the dwelling house of one Samuel H. Rabin (the petitioner), being the premises commonly known and described as 8534 West Jefferson avenue, in the city of Detroit'.[4]

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[1]

To determine 'upon the examination of the whole matter' whether an offense had been committed, and whether there was probable cause to charge defendants therewith. Mich. Code of Crim. Proc., chap. 7, § 13 (Mich. Comp. Laws 1929, § 17205 [Stat. Ann. § 28.931]).

[2]

Such amendments were allowed under a liberal statute permitting them. Mich. Code of Crim. Proc., chap. 7, § 76 (Mich. Comp. Laws 1929, § 17290 [Stat. Ann. § 28.1016]).

[3]

It may be noted that each count involves the same transaction.

[4]

Section 72 of the Mich. Penal Code (Mich. Stat. Ann. § 28.267) provides in part: 'Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupies, whether owned by himself or another, . . . shall be guilty of a felony, punishable' etc.

Count Three (3), as amended, charged in substance that the defendants did 'wilfully and maliciously burn a certain building, to wit, a store building, the property of said Samuel H. Rabin and Rose Rabin, premises commonly known and described as 8532 Jefferson avenue West, in said city of Detroit'.[5]

Count Four (3) charged in substance that the defendants did 'wilfully burn certain personal property . . . owned by the Ideal Wallpaper and Paint Company while then and there situated in the premises commonly known and described as 8532 West Jefferson avenue, . . . and the household goods, furniture and personal effects owned by Samuel H. Rabin while then and there situated in the premises known and described as 8534 West Jefferson avenue, . . . with intent to injure and defraud the insurers of said personal property'.

Count Five (4) charged in substance that the defendants did 'wilfully burn a certain building, to wit, 8532-8534 West Jefferson avenue, . . . with intent to injure and defraud the insurer of said building'.[6]

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[5]

Section 73 of the Michigan Penal Code (Mich. Stat. Ann. § 28.268) on which this court rests, provides: 'Any person who wilfully or maliciously burns any building or other real property other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony, punishable' etc.

[6]

Section 75 of the penal code (Mich. Stat. Ann. § 28.270), on which counts four and five are predicated, provides: 'Any person who shall wilfully burn any building or personal property which shall be at the time insured against loss or damage by fire with intent to injure and defraud the insurer, whether such person be the owner of the property or not, shall be guilty of a felony'.

The petitioner, when arraigned (viii), refused to plead, and a plea of not guilty was entered, but he filed no motion to quash the information, nor did he or his counsel demand a bill of particulars.[7]

2. At the close of the State's case, petitioner's counsel, who now represents him, moved (211-212) for a directed verdict on the ground, *inter alia,* that the people had not proved any offense or any offense charged in the information, contending further that count one particularly should be dismissed because it charged the burning of an '*occupied*' dwelling house, whereas the proofs showed that it was '*unoccupied* at the time' (emphasis is ours); and that counts one and three should be dismissed because the prosecution should charge burning of a structure *within* the curtilage or *without* the curtilage, or at least the prosecution should elect.[8] Both motions were denied, with leave to renew them.

At the close of the case, counsel for petitioner renewed his motion for a directed verdict on the same ground, and it was denied; the motion to elect was granted in part (307-309).

In his argument to the jury on final summation (337), counsel for petitioner urged, in part, that since the paint store in question could have easily been burned by petitioner, Rabin, himself, if he desired to do so, by some little act

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[7]

See Code of Criminal Procedure, chap. 7, § 44 (Mich. Comp. Laws 1929 [Mich. Stat. Ann. § 28.984]).

[8]

There is no hint here of a federal question, no intimation that because Rabin was charged with the offense of 'burning' property, whereas he merely procured somebody else to do the job for him, he had been denied due process of law.

of carelessness on his part, and that he (Rabin) 'didn't have to go out and hunt anybody from the ends of the earth to burn this place down'.

In his instructions to the jury, the trial court directed attention to the statutory definition of the word 'burn', pointing out (371-372) that the term included 'aiding, counseling, inducing, persuading or procuring another to such act or acts.[9]

On motion for new trial (401-403), following verdict (400) of guilty, counsel for petitioner did not claim that Rabin was deprived of due process of law because the information failed to charge the crime proved (alleged), against him. He merely contended (402), among other things, that a new trial should be granted 'because the verdict of the jury is against and contrary to the great weight of the evidence'.

And the error assigned (408) on appeal to the state supreme court was: 'The trial court erred in holding that defendant Rabin could be guilty of the crimes charged against him although he was not present and did not participate in the actual burning'. [10]

3. Counsel correctly states that during the course of argument of counsel to the jury, two jurors failed to appear

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[9]

Section 71 of the Michigan penal code (Stat. Ann. § 28.266) provides that 'the term "burn" as used in this chapter (dealing with arson and burning) shall mean setting fire to, or doing any act which results in the starting of a fire, or aiding, counseling, inducing, persuading or procuring another to do such act or acts'.

[10]

It is our contention that such an assignment of error does not set up or claim any title, right, privilege, or immunity under the Constitution of the United States. 28 USC § 344.

because of illness; and that it was then agreed by the prosecutor, counsel for petitioner, and petitioner, that the case proceed with the 10 remaining jurors. This consent was oral and not in writing. This should be elaborated.

When informed by the officer in charge of the jury that two jurors were absent on account of illness, [11] the trial judge presented (328) to counsel the alternatives: 'proceeding with the jurors remaining, the ten jurors who are here, which can only be done, of course, with the consent of both sides, or the proposition of a continuance of the case until recovery of the two jurors'.

Petitioner's counsel (who represents him in this Court on application for certiorari) stated that he had consulted with Mr. Rabin (petitioner here), who was there at his side as he made the statement, and (328-329)

> "(counsel said) among all of the possibilities we think it is fair to the people and perhaps preferable to him to proceed with the trial to a decision by the ten jurors, and we so agree".

The court felt, however, 'there should be something put on the record by the defendants themselves. A statement that both defendants are satisfied' (329). And counsel for Rabin agreed that was so. Under examination by the court, Rabin said he had heard the proposition stated by his counsel and that he had discussed the matter with him. The court advised Rabin of his constitutional right, 'as a citizen, to be tried by a jury of twelve people'. The following colloquy occurred (329-330):

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[11]

It appeared that Detroit was at the time suffering from an epidemic of influenza, two members of the judge's family being included among the sufferers (331).

"**The Court:** . . . That is a right which cannot be taken away from you. Of course, I have no desire to deprive you of any of your rights. . . Now, . . . there are only ten jurors. You have the right, under the decisions of our supreme court, to consent to a trial by less than twelve, if you consent to it.

Mr. Rabin: I do.

The Court: It can't be done without your consent? I cannot order you to proceed nor can Mr. Nelson (Rabin's counsel), or the prosecutor; it is entirely up to you. If you wish to be tried by less than twelve you have the right to do so, in which case we will proceed with this case, do you understand that?

Mr. Rabin: I understand it, your honor.

The Court: And you are desirous of proceeding with the remaining ten jurors?

Mr. Rabin: Yes, your honor.

The Court: You understand your rights, as I have explained them to you and Mr. Nelson has also explained them to you?

Mr. Rabin: Yes, sir.

The Court: Your rights are understood by you?

Mr. Rabin: Yes, sir.

The Court: It is a question now of your desire?

Mr. Rabin: Well, I desire this way.

The Court: You desire to proceed with the remaining ten jurors?

Mr. Rabin: Yes, your honor'' (330).

After the verdict, petitioner's counsel (the same lawyer) moved for a new trial (402, 13th ground) 'because this defendant was not accorded his right to a trial and verdict by twelve jurors'. And he assigned (409) the same ground on appeal.

4. It is also contended that there was such influencing or coercion of the jury as to void its verdict under the 14th Amendment. This is based on the following episode (331-332) and incident (364):

After the jury had returned, following the foregoing colloquy between court, counsel, and defendants, the court remarked the 'flu has struck, and it then developed that Mrs. Hanson, another juror, was also suffering from the trouble, but she stated she would be able to go ahead that day, but not after. She would try. The court then inquired of petitioner's counsel: 'Is that agreeable, gentlemen?', and Mr. Nelson, Rabin's attorney, replied:

''**Mr. Nelson**: Inasmuch as she says she is able to go ahead, I will be glad to accept her word.'' (332).

Again questioned, Mrs. Hanson thought she would be able to go ahead and listen to the court's arguments and the court's charge; she would try. Whereupon, Mr. Nelson, petitioner's counsel proceeded with his argument to the jury (332).

After the arguments, and just before his charge, the court advised counsel he had communicated with two jurors,

who desired to be excused (from further duty) 'after termination of this case' (364); and he told counsel he had advised the jurors to see him 'after the case is over'. No objection was interposed by counsel for petitioner.

In his motion for new trial (402), counsel for petitioner assigned as one of his reasons therefor that 'a number of the remaining jurors were too ill with influenza to sit as jurors'. And he assigned the same ground on appeal (409, ground 16).

III

Respondent's Suggestions as to why jurisdiction should not be assumed.

Counsel for petitioner invoke the jurisdiction of this court under § 237 of the Judicial Code as amended (28 USC, § 344), apparently for the reason, though not so stated, that in the courts below some right, privilege, or immunity was specially set up or claimed by petitioner under the 14th Amendment to the Constitution of the United States. And they urge the writ to be granted for the following reasons: *(1)* that the supreme court of the State of Michigan has considered and denied petitioner's claim that under the 14th Amendment, he must be charged with the crime proved against him; *(2)* that the court below has considered and denied petitioner's claim that under article 2, § 19, of the Michigan State Constitution of 1900 (sic), only a jury of 12 members can convict him in accordance with due process under the 14th Amendment; and *(3)* that the court below has considered and rejected petitioner's claim that the jury was so influenced and coerced as to make its verdict a nullity and a denial of due process.

The respondent respectfully suggests that jurisdiction should not be assumed by this Court, since the state court did not decide a federal question of substance (Court Rule 38, par. 5 [a]). The three questions now presented were not raised in their federal aspect in the trial court, or in the supreme court on appeal, and decisive, substantial, non-federal grounds sustain the Michigan court in its order affirming petitioner's conviction.

We respectfully submit, in general terms, that petitioner was convicted in a court of competent jurisdiction of a criminal offense defined by the laws of the State of Michigan; and that throughout the entire proceeding he was represented by the same competent counsel who appears in his behalf on application for certiorari. Specifically:

1. Petitioner was charged in the information with having 'burned' certain property, wilfully and maliciously, and, in two counts, with intent to defraud insurers. The language of the information followed that of the statute; and under the terms of the statute the term 'burn' is defined to include 'procuring another to do such act'. Counsel contends this was a denial of due process because, if petitioner was guilty at all, the proofs show he 'procured' others to burn the buildings, and they do not establish the fact that he committed the actual deed.

But the federal constitutional question was not raised in the trial court when the testimony was received; it was not presented to the trial judge on motion for directed verdict (211-212); in fact, when counsel moved for dismissal it was largely on the ground that the State had failed to prove that the building which was burned had been occupied. Counsel clearly understood the nature of the offense charged when he argued to the jury (337). So far as the record shows, counsel for defense made no requests to

charge; and they listened, without objection, while the court instructed the jury to the effect that under the penal code of the State of Michigan, the term 'burn' included the procuring of another to do the act (371). On motion for new trial (401-403) petitioner's counsel did not claim that (because of the language of the information) federal constitutional rights had been violated. And, as we have observed in our counter-statement, he assigned the following *non-federal* reason and ground for appeal to the Michigan supreme court (408):

> "**11.** The trial court erred in holding that defendant Rabin could be guilty of the crimes charged although he was not present and did not participate in the actual burning".

The supreme court held (syl. 2, 27 NW 2d 126): 'Evidence that defendant hired others to do the burning sustained arson conviction under information charging that defendant and codefendant burned building, in view of statute defining "burn" as meaning to do any act resulting in the starting of a fire, or inducing another to do such act, since rule as to accessory and principal governed information.' It did not consider this to be a federal question [12] And, while not significant, one may note that the syllabi in the unofficial report (27 NW 2d 126) indicate no federal constitutional question.

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[12]

Chapter 7, § 39, of the Michigan code of criminal procedure (Mich. Stat. Ann. § 39), provides: 'Sec. 39. Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed the offense'.

2. It clearly appears from the record in this case (328-330) that both petitioner and his counsel knowingly and understandingly waived the right to trial by jury of 12 members; that the trial court, even after counsel for Rabin had expressed his desire to proceed with the 10-member jury, carefully and meticulously instructed the petitioner concerning his constitutional rights; that the petitioner said he had consulted his attorney, and that he understood the situation; and that, after all of this, the petitioner expressed his desire, if not his preference, to proceed with the case and submit his fate to 10 jurors.

However we may respect counsel in this case, we cannot follow their argument. Nor can we see or understand how an accused person could possibly be permitted to make the choice that Rabin made in the trial court, then hope to change front in this manner on appeal.

This Court has held that the constitutional right of one on trial for crime to a jury of 12 persons may be waived, even in the case of serious offenses, either altogether, or by consenting to a trial by a less number than twelve,

Patton v. United States, 281 U.S. 276; see annotation 70 ALR 263, at 279; 105 ALR 1114;

Adams v. United States ex rel. McCann, 217 U. S. 269, 275.

See also:

Weiss v. Hood, 201 Ga. ——, 38 SE 2d 559; certiorari denied by this Court Oct. 31, 1946, Docket No. 456, 91 L. ed. 63

Moreover, the supreme court of the State of Michigan, in deciding the question presented, held that 'no statute of

this State requires that the defendant can only in writing waive the full number of 12 jurors and be tried by less than the full number of 12 jurors', and, speaking of the statutory requirement, [13] the court said: 'it is the waiver of the jury entirely for the trial and consent to trial by the court that is required to be in writing. No error was committed in proceeding with 11 (10) jurors upon defendant's oral consent'.

3. Nor is there any evidence of coercion in the fact that the trial judge allowed one of the juror's to continue her service until the case was terminated; certainly there was no denial of due process, for the judge merely acted within the range of sound judicial discretion. Moreover, counsel for petitioner (who represents him here) was glad to accept the word of the juror that, in spite of her illness (the 'flu), she was able to go on. And there is nothing in the record to indicate that counsel later objected on this score.

IV

Conclusion.

We, therefore, respectfully submit that the petition for certiorari should be denied.

Respectfully Submitted,

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